

1417719 (Migration) [2015] AATA 3472 (8 October 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Jerome BRABAND

CASE NUMBER: 1417719

DIBP REFERENCE(S): CLF2013/47835

MEMBER: Margie Bourke

DATE: 8 October 2015

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A

Statement made on 08 October 2015 at 12:40pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 8 October 2014 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 6 March 2013 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied based on the information provided that the applicant and sponsor met the requirements for a *de facto* relationship, and the r.2.03A criteria.
4. The applicant appeared before the Tribunal on 8 October 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Ms Karakasis and a previous employer of the applicant Mr Portet.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant meets the definition of *de facto* relationship and the r.2.03A criteria.
7. The Tribunal has considered the Departmental file and the Department's decision record dated 8 October 2014. The Tribunal notes that the applicant provided the Department with the application forms and a handwritten letter dated 17 August 2014 which states he had forwarded some documents in the mail that day and would forward more documents in the coming week.
8. Prior to the hearing the applicant provided the Tribunal with several documents in support of the application for the visa, including a statement from the sponsor dated 29 September 2015 which states the parties met on 21 August 2011, introduced him to her family at Christmas 2011, housesat for Ian and Lola for 6 weeks and then for Anne for 7 weeks, and then they found their current apartment in Caulfield North. The statement also described the parties life together, their pets, activities and financial arrangements, and the applicant's proposal of marriage. The documents include the bond receipt for the North Caulfield apartment, in both parties names, dated 1 August 2012.
9. Other documents provided include three statutory declarations. One is from the sponsor's sister dated 24 September 2015. Another statutory declaration is from a friend of the sponsor's dated 18 September 2015 in which she refers to three sets of photographs provided by the applicant that she had taken when the parties first met, at her 40th birthday in 20102 and also at a celebration in 2014. The third statutory declaration is from a friend of the applicant and is dated 18 September 2015. None of the statutory declarations describe

the commencement of the de facto relationship between the parties, but they all attest to the genuine relationship of the parties and why they have this belief.

10. The applicant has also provided a series of photographs which are labelled and dated in handwriting. . There is confirmation of a joint bank account opened on 10 September 2012, and joint bank statements after that date. Earlier bank statements are provided in the sponsor's name with a different address recorded on the statement. The applicant has provided utility bills, some in joint names for the North Caulfield address, all dated after August 2012.
11. The applicant provided a medical report from ReCreation Medical centre, dated 25 September 2015. The report states the doctor has been the GP for the applicant for four years and his partner for at least eleven years. The report adds that it is clear from the nature of the medical records and nature of the consults that the parties have been in a sexual relationship. The Tribunal has considered this report and accepts the doctor has been the GP for the applicant for four years. The Tribunal does not interpret the report as stating the doctor has knowledge that the parties have been in a defacto relationship for four years. The Tribunal is satisfied the report is evidence that during at some point the last four years the doctor has considered the applicant and the sponsor have become partners.
12. The applicant has provided letters from the Armadale gym confirming the sponsor has been a member since 2008, and the applicant has been a member since 29 November 2012. The applicant has provided copies of emails, the first is dated April 2012. Other documents provided by the applicant to the Tribunal include receipts and a Jetstar invoice for flights in both parties names in November 2014.
13. At the hearing the applicant also provided a statutory declaration from a previous employer who had employed the applicant from January 2012 and had met the sponsor during that time, a copy of two emails from the applicant to the sponsor, an email confirming the joint lease commenced 28 July 2012, some health documents and a copy of the applicant's current French passport.

SPOUSE/DE FACTO (cl.820.211(2)(a), cl.820.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

14. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. Based on the sponsor's Australian passport, the Tribunal is satisfied that the sponsor is an Australian citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

15. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
16. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.

17. Based on the oral and written evidence before it, the Tribunal is satisfied that at the time of application the applicant and sponsor had a joint bank account and lived together in a jointly rented apartment. The Tribunal is satisfied that the applicant was responsible for paying rent and the sponsor was responsible for paying utility bills. The Tribunal is satisfied that the parties had taken out insurance for their pets. The Tribunal is satisfied that at the time of application the applicant was in full-time employment and the sponsor was studying and also part-time employment. The Tribunal is satisfied that the parties shared the legal obligations and household expenses. Based on the evidence of the hearing the Tribunal is satisfied that at the time of decision the parties are discussing whether to invest in a restaurant or real estate, and are saving for a possible overseas trip to France. The evidence of the financial aspects of the relationship is that the parties have shared their financial resources, their legal obligations and their household expenses both at the time of application and continue to do so at the time of decision. The evidence of the financial aspects of the relationship is that the parties were in a genuine and continuing relationship and had a mutual commitment to a shared life to the exclusion of all others at the time of application and continue to be so at the time of decision.
18. Based on the oral and written evidence before it, the Tribunal is satisfied that the parties share their responsibility of and care for their two cats. The Tribunal is satisfied that to the applicant and the sponsor share their domestic responsibilities, and accepts that the applicant does more of the cooking while the sponsor does more of the laundry and cleaning within the division of the household responsibilities. The evidence of the nature of the household is that the parties are in a genuine and continuing relationship, and lived together or not separately and apart on a permanent basis, at the time of application and continue to do so at the time of decision.
19. Based on the oral and written evidence before it, the Tribunal is satisfied that the parties represent themselves to other people as being in a de facto relationship with each other. The Tribunal is satisfied, based on the statutory declarations of the sponsor's sister, and the written and oral evidence at employers of the applicant that the parties represent themselves to members of the family and work colleagues as being in a de facto relationship. The Tribunal has also considered the bond receipt for the parties' apartment in joint names, the parties' gym memberships and the travel documents relating to trips the parties have taken together. The Tribunal has considered the evidence at the hearing that the parties go to the movies together and go to restaurants for dinner together. The Tribunal is satisfied that the parties undertake social activities together. Based on the evidence of the social aspects of the relationship the Tribunal is satisfied that the parties were in a genuine and continuing relationship and that the parties have a mutual commitment to a shared life to the exclusion of all others at the time of application and continue to do so at the time of decision.
20. The Tribunal has considered the evidence of the parties in relation to their commitment to each other. The Tribunal is satisfied that the parties met in August 2011. The Tribunal is satisfied that the parties initially 'house sat' for other people for periods of six weeks and seven weeks to ensure that their relationship was strong enough to endure living together, prior to committing to a de facto relationship. The Tribunal is satisfied that the parties have provided emotional support to each other, and their plans for the future demonstrate that the parties view the relationship as long-term. The Tribunal has considered the evidence of Mr Portet that the parties are committed to each other. The Tribunal has considered the duration of the relationship and the length of time the parties have lived together at both the time of application and the time of decision. Based on the evidence before it, the Tribunal is satisfied that the evidence of the nature of the persons' commitment to each other is that the parties were in a genuine and continuing relationship at the time of application and continue to be so at the time of decision.

21. The Tribunal has considered the evidence of the applicant and the sponsor, including their cultural heritage and nationality and is satisfied that they are not related by family.
22. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application and at the time of decision. For this reason the Tribunal is satisfied that at the time of application the applicant meets the requirements of cl.820.211(2)(a).
23. The Tribunal has considered the application forms and the passports of both the applicant and the sponsor which records the holders' dates of birth. The Tribunal is satisfied that the applicant is sponsored by the applicant's de facto partner, and that she has turned 18 at the time of application. For this reason the Tribunal is satisfied that at the time of application the applicant meets the requirements of cl.820.211(2)(c).
24. There is no evidence before the Tribunal that the applicant was not the holder of a substantive visa at the time of application. The Tribunal is satisfied that the applicant was the holder of a working holiday visa at the time of application and therefore meets the requirements of cl.820.211(2)(d).
25. Therefore the applicant meets the requirements of cl.820.211(2) and cl.820.221.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

26. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
27. Based on the dates of birth recorded in the passports of both the applicant and the sponsor the Tribunal is satisfied that both parties were at least 18 years old at the time of application.
28. The Tribunal has considered the evidence before it, in particular the bond receipt dated 1 August 2012 and the email from the real estate agent confirming that the lease commences on 28 July 2012. The Tribunal has considered that prior to that date the parties had 'house sat' for two periods of six weeks and seven weeks over the Christmas break and in early to mid 2012, and that the applicant had spent some time with the sponsor at her parents house. The Tribunal is not satisfied that the applicant and sponsor were in a de facto relationship prior to them moving into their apartment house together, as the applicant and sponsor had stated that the house sitting was to ensure that their relationship could survive living together. For this reason the Tribunal is satisfied that the de facto relationship existed from 28 July 2012 when the parties moved in to their apartment in North Caulfield. The Tribunal is not satisfied that the de facto relationship between the applicant and sponsor had been in existence for 12 months prior to the date of application.
29. The Tribunal is satisfied that the applicant has established compelling and compassionate circumstances for the grant of the visa although the de facto relationship had not been in existence for 12 months prior to the date of application. The compelling and compassionate circumstances include that the sponsor had left her employment of 17 years in March 2012 partly on the basis of her developing relationship with the applicant. The Tribunal accepts that the sponsor's job had involved nightshifts and morning shifts that impacted the developing relationship. The Tribunal also accepts that the applicant and sponsor had taken

on two periods of housesitting of six weeks and seven weeks prior to committing to the de facto relationship as periods of testing that the relationship would work. The Tribunal accepts that this shows commitment to the relationship. The Tribunal also finds compelling and compassionate circumstances that the applicant spent time with the sponsor and her parents, (which adds to the duration of their relationship although perhaps not meeting the definitive requirements of s5CB), whilst they looked for an apartment that they could rent together. The Tribunal finds that the sponsor's commitment to the relationship including leaving her job of 17 years, the commitment demonstrated by both the sponsor and applicant to their relationship and the evidence of the witness as to the genuineness of the relationship, when considered collectively amount to compassionate and compelling circumstances for the grant of the visa.

30. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.
- 32.

DECISION

33. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211(2) and cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A

Margie Bourke
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).